IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 24056/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

[redacted]

E.M. KUBUSHI **DATE: 15 APRIL 2024**

COOPER, PETRONELLA MAGDALENA Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 15 April 2024*

JUDGMENT

KUBUSHI, J

[1] This matter pertains to a claim for personal injuries sustained by the Plaintiff in a motor vehicle collision that occurred on 25 September 2017. The Plaintiff was, at the time of the collision in question, a passenger in one of the insured motor vehicles that were involved in the said collision. The Plaintiff is, in this matter, suing the Defendant

in terms of section 17 of the Road Accident Fund Act[1] for compensation arising from the negligent driving of the insured motor vehicle.

[2] The matter was placed on the civil trial roll call of 24 February 2024. When it was initially called, counsel for the Plaintiff requested a stand down of the matter citing a possibility of settlement. When the matter was called again later on, counsel for the Plaintiff requested a further stand down of the matter as she was waiting for the arrival of the Defendant's legal representative. The settlement negotiations did not succeed, and the matter was to proceed. When the matter proceeded after being called for the third time, the parties confirmed that the matter was to proceed on *quantum* only, because the merits part of the claim had been settled, although not yet reduced to a court order. The only head of *quantum* for consideration was that of general damages which had served before the Appeal Tribunal of the HPSCA, and a finding that the injuries sustained by the Plaintiff be classified as serious in terms of the narrative test, was made.

[3] Before the commencement of the hearing, the Defendant's legal representative submitted that the matter was not properly before court, or that it was before a wrong forum as the Defendant had not filed its plea. The contention was that the Plaintiff should have first placed the Defendant under bar before applying for the matter to be set down for hearing. The submission was also that the matter was before a wrong forum because, without a plea being filed, the Plaintiff should have applied for judgment in default and then such application should not have been set down on the civil trial roll, but placed on the default judgment roll.

[1] Act 56 of 1996.

[4] In response to this argument, it was submitted on behalf of the Plaintiff that the Defendant had indicated in numerous correspondence that it had filed its plea, and that the Plaintiff applied for the matter to be set down on the civil trial roll on the assumption that the Defendant had already filed its plea though the Plaintiff had not received same. On a question from the bench as to why would the matter be set down for hearing based only on an assumption that the plea has been filed, counsel for the Plaintiff responded by saying that the Plaintiff had been waiting for the Defendant's plea for a long time. The contention was that the cause of action in this matter arose seven years ago and the Defendant has still not filed its plea after it had been asked to do so by the Plaintiff's legal representatives on numerous times. The Defendant's legal representative could not provide a cogent reason why the Defendant has still not filed its plea except to reiterate that the matter cannot be proceeded with because the plea has not been filed and the Plaintiff has followed an improper process by approaching the court in the manner he did. The Defendant's legal representative, in reinforcement of her submission relied on a Practice Directive that she said described the process that ought to have been followed by the Plaintiff under the prevailing circumstances. She, however, could not provide the said Practice Directive nor could she provide the details and/or number and year of that Practice Directive.

[5] The Plaintiff's counsel requested a stand down to look up the authority or the rules that would set out the procedure to be followed in the circumstances of this matter. On the court's resumption, the Plaintiff's counsel referred to rule 22 of the Uniform Rules of Court (the Rules) as authority for the process that was to be followed. Subrule (1) thereof provides that

> *'where a defendant has delivered a notice of intention to defend he shall within 20 days after the service upon him of a declaration or within 20 days after delivery of such notice in respect*

of a combined summons, deliver a plea with or without a claim in reconvention or an exception with or without an application to strike out'.

In light of this subrule counsel argued that since the notice to defend was served on 5 November 2020, the Defendant had 20 days thereafter within which to file its plea which it failed to do.

[6] Counsel further referred to rule 26 which provides that

'*any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall ipso facto be barred'*.

The rule provides further that

'*if any party fails to deliver any other pleadings within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within time therein required or within such further period as may be agreed between the parties shall be in default of filing such pleading and ipso facto barred. Provided that for the purposes of this rule the days between 16 December and 15 January both inclusive shall not be counted in the time allowed for delivery of any pleading'*.

On the basis of this rule, counsel sought to argue that the Plaintiff was not obliged to force the Defendant to file its plea and having failed to file its plea within the time stipulated in rule 26, the Defendant had been *ipso facto* barred. Counsel argued further that it has been three years since the Defendant filed its notice of intention to defend the matter but has to date hereof not filed its plea which is prejudicial to the Plaintiff. Besides, by placing the matter on the civil trial roll, the Plaintiff opted not to apply for default judgment, but has given the Defendant an opportunity to defend and argue the matter.

[7] At the end of the argument by both parties, it was ruled that the matter be proceeded with. The Plaintiff's counsel argued the matter of general damages on the papers. In support of the injuries and the *sequelae* sustained by the Plaintiff, and in fortification of her argument, counsel relied on the medico-legal report of Dr J F Zuurvogel the orthopaedic surgeon and Francien de Ridder, a clinical psychologist.

[8] When it was the Defendant's turn to argue, the legal representative reiterated her argument that the matter was not properly set down and that it was not before a proper forum. Her further contention was that she was not in a position to argue the issue of general damages. She, in addition, raised certain objections which pertain to the merits of the matter. For the decision that is finally reached, it is not necessary to deal with those objections in this judgment.

[9] The author *Erasmus* in his book *Superior Court Practice*,[2] describes the effect of rule 26, in particular referring to the phrases '*Fails to deliver a replication . . . fails to deliver any other plea*', as follows:

> (a) Failure to deliver a declaration or plea within the time stated does not entail an automatic bar; notice of bar must be given.
>
> (b) Failure to deliver replication or subsequent pleading within the time stated entails an automatic bar, and no notice of bar is necessary.

In this regard, *Erasmus* relied on the judgment in *Landmark Mthata,*[3] in which that court when making observation about the wording of rule 26 held that

> *'According to rule 26 a failure to deliver a replication or subsequent pleading will result in an automatic barring. Such automatic barring, whilst it may result in some form of prejudice in that*

[2] Erasmus: Superior Court Practice Vol 2, second edition, pD1-319.

[3] Landmark Mthata (Pty) Ltd v King Sabata Daliyendyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthata (Pty) Ltd 2010 (3) SA 81 (ECM) at 86B – C and 86A – B.

the party concerned may be prevented from pleading its case fully and properly, will result in the shutting of the doors of the court to such litigant by way of default judgment. The only pleadings, which according to the rule, require a notice of bar to be served as a precursor to the barring of such litigant from pleading further are, in effect, a declaration and a plea (and an exception to particulars of claim or a declaration as a precursor to pleading thereto). It follows logically that the framers of the rules must have had in mind an automatic barring of a declaration or a plea, would be too drastic a measure. Hence the requirement that the defaulting party ought to be placed under bar by way of notice to file the relevant pleading within the five-day period, before such party is regarded as being in default of filing the pleading concerned and ipso facto barred.[4]

[10] In *Landmark Mthata*, the court was dealing with a default judgment application which was filed after the dismissal of an exception filed by the respondent subsequent to the filing of a notice of bar by the applicant. By way of background, African Bulk Earthworks had sued the applicant who then joined the respondents, claiming a contribution or indemnification. The respondents failed to plead timeously and notices of bar were served on them. Within the five-day period for the filing of the plea, the (first) respondent delivered a rule 23(1) notice advising of its intention to except to the applicant's third party notice, and the exception duly followed. The exception was heard and dismissed, without any direction as to the filing of a plea. The application for default judgment was subsequently delivered and the respondent delivered its plea. The applicant argued that it was entitled to pursue default judgment, despite the filing of a plea by the respondent because the notice of bar delivered before the filing of the exception, remained operative even though the respondent has brought an exception to that notice. The court dismissed the application for default judgment and reasoned that the first respondent duly complied with the notice of bar and was not required,

[4] Para 11.

upon dismissal of the exception, to seek an order granting leave to deliver its plea. Accordingly, so the court held, for the applicant to have been in a position to seek default judgment, it would have had to deliver a further notice of bar on the first respondent, requiring it to plead.

[11] The Practice Directive which the Defendant's legal representative sought to refer to is the Judge President's Practice Revised Directive 1 of 2021("the Practice Directive"). In terms of paragraph 5.4 of the said Practice Directive, a Plaintiff is generally entitled, in terms of the Rules of Court, to proceed to seek a default judgment where a Defendant fails or refuses to file a notice of intention to defend or fails or refuses to file a plea. In such instances and with respect to "Y" matters [where the defendant is the RAF or the MEC Health, Gauteng or PRASA], the Plaintiff must comply with paragraphs 5.5 and 5.6 of the Practice Directive.

[12] Paragraph 5.6 of the Practice Directive stipulates that where the Defendant in category "Y" [where the defendant is the RAF or the MEC Health, Gauteng or PRASA] has filed a notice of intention to defend but has failed or refused to file a plea, and the Plaintiff has served and filed a notice of bar in terms of the Rules of Court, the Plaintiff must follow the procedure set out in paragraph 5.5, which authorises a Plaintiff to make application to obtain judgment by default as contemplated in Chapter 6 of this directive. Chapter 6 provides, amongst others, in paragraph 26 that if it is necessary to proceed with the application for default judgment, a hearing in the Default Judgment Trial Court shall take place.

[13] It is common cause that the Defendant filed its plea on 5 November 2020 and has to date hereof not filed its plea. It is, also, common cause that the Plaintiff has not placed the Defendant under bar. Counsel for the Plaintiff conceded in oral argument

that the matter was placed on the civil trial roll under the assumption that the Defendant has filed its plea. Counsel conceded in answer to a question from the bench that the plea has not been served on the Plaintiff or rather that the Plaintiff or his legal representatives have not seen the plea, and the Defendant's legal representatives further in oral argument conceded that the plea has not been filed. The reliance by the Plaintiff's counsel on the argument that the failure by the Defendant to file its plea after three years renders it *ipso facto* barred from doing so, is without merit. Rule 26 which counsel referred to is explicit, in that failure to deliver a plea within the time stated does not entail an automatic bar; notice of bar must be given. Even after three years, where the Defendant has not pleaded, a notice of bar must still be served on the Defendant. As in *Landmark Mthata*, where the applicant had filed a notice of bar before the exception was served, the court still required the applicant to have served another notice of bar after the dismissal of the exception, for the applicant to have been in a position to seek default judgment. This ruling serves as an indication that without the notice of bar, the Defendant cannot be *ipso facto* barred.

[14] The further suggestion by the Plaintiff's counsel that the Plaintiff is not obliged to force the Defendant to file its plea or that the rules have no provision with which the Defendant can be forced to file its plea, has no substance. Rule 26, read with paragraphs 5.4 to 5.6 of the Practice Directive, is the very rule with which the Defendant can be forced to file its plea. This can be done by placing the Defendant under bar. Paragraph 5.6 of the Practice Directive, also, requires the Plaintiff to file a notice of bar in terms of the Rules of Court where the Defendant has failed or refused to file a plea.

[15] The contention by the Defendant's legal representative that the Plaintiff followed an incorrect process to place the matter on the civil trial roll, is meritorious.

The Plaintiff, as conceded, placed the matter on this roll on the *assumption* that a plea has been filed and that there was, as such, no need to place the Defendant under bar. This is, clearly, a wrong process. The correct process as afore stated, is to first place the Defendant under bar and if the plea is not delivered within the five days provided in rule 26, then the Defendant will be *ipso facto* barred from delivering a plea. The next process to follow, as argued by the Defendant's legal representative would be to place the matter on the default judgment roll. Chapter 6 of the Practice Directive provides, amongst others, in paragraph 26 thereof, that if it is necessary to proceed with the application for default judgment, a hearing in the Default Judgment Trial Court shall take place.

[16] The matter can, therefore, not be entertained in this court. The Defendant must follow the proper processes in terms of the rules of court and Practice Directive to have this matter placed in the proper forum for hearing.

[17] The matter is removed from the roll and no order as to costs is made.

E M KUBUSHI

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Date of hearing: 20 February 2024

Date of judgment: 15 April 2024

APPEARANCES:

For the Plaintiff:	Adv M Kruger instructed by PAS Attorneys
For the Defendant:	Ms. B Kgoebane instructed by State Attorney